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In The

Supreme Court of the United States

October Term, 1987

STATE OF COLORADO, ex rel. Colorado Attorney General Duane Woodard,

Petitioner,

vs.

WESTERN PAVING CONSTRUCTION CO.,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER STATE OF COLORADO IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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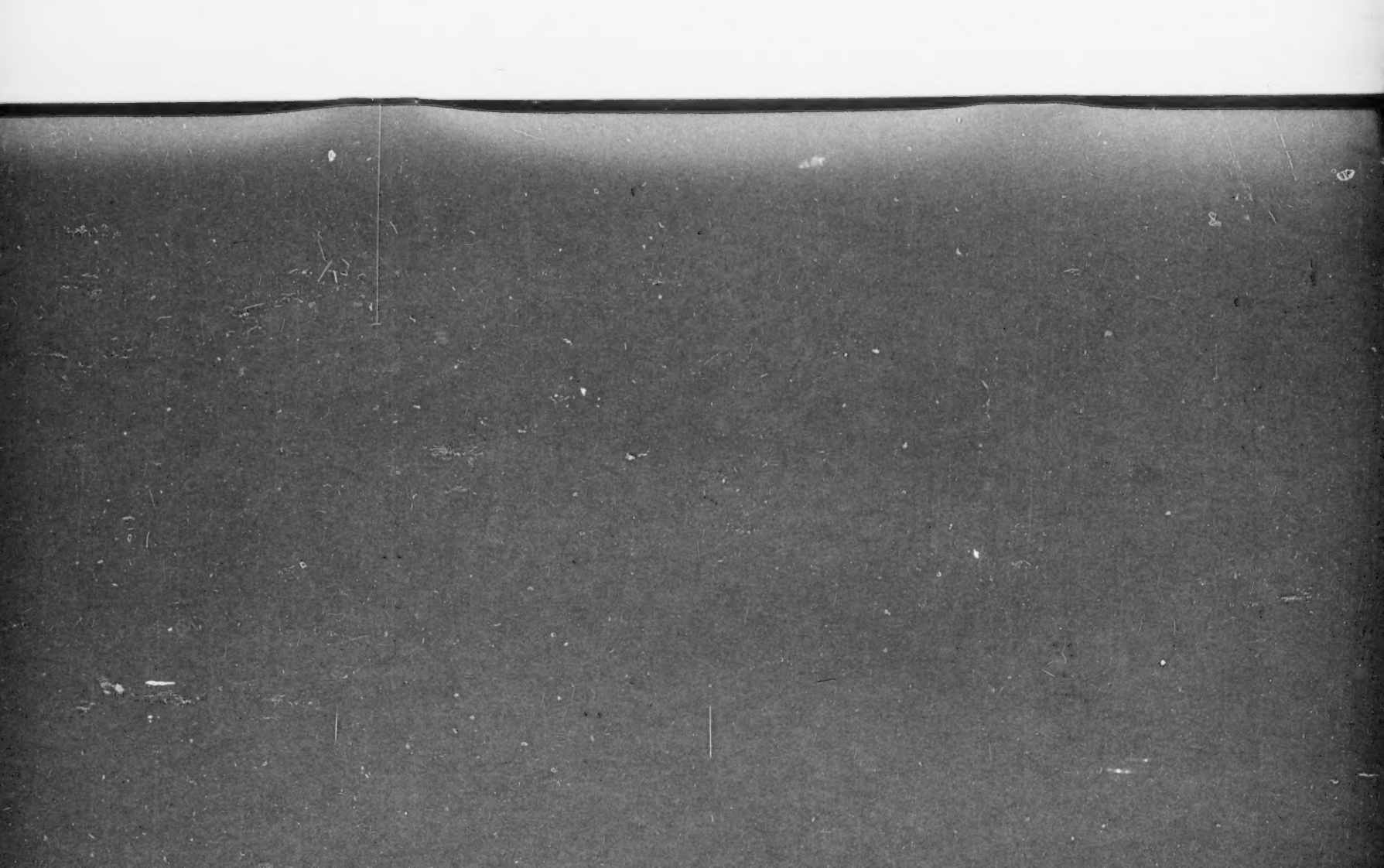

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RULE

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Pursuant to S. Ct. R. 22.6, the State of Colorado submits this supplemental brief in support of its June 8, 1988 petition for issuance of a writ of *certiorari* in the instant case. The basis for this supplemental filing is the subsequent decision in *Texas v. Allan Construction Co.*, 851 F. 2d 1526 (5th Cir. 1988). *See* App. That opinion is the most recent of five federal appellate rulings in less than a year, including two in the case at hand,[1] on the same question—the equitable tolling of the federal antitrust statute of limitations pursuant to the doctrine of fraudulent concealment.[2]

The *Allan* opinion heightens the necessity for the Supreme Court to grant *certiorari* in the instant action, in order to:

1. Clarify an increasingly important area of federal law which has not previously been addressed by the Court in an antitrust context.

2. Resolve the growing split among the lower federal courts, which has been accentuated by the *Allan* decision.

3. Rectify the erroneous result in the case at hand, the egregiousness of which is underscored by the result in *Allan*.

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[1] *See Colorado ex rel. Woodard v. Western Paving Constr. Co.*, 833 F. 2d 867 (10th Cir. 1987), *panel opinion vacated and district court decision aff'd by an equally divided court (per curiam)*, 841 F. 2d 1025 (10th Cir. 1988) (*en banc*).

[2] Four of the five recent circuit court fraudulent concealment rulings have come in the same context—highway bidrigging cases (*i.e.*, treble damage actions by state attorneys general against contractors, alleging bidrigging on highway construction projects). In addition to the Fifth Circuit's *Allan* decision and the panel and *en banc* rulings by the Tenth Circuit in the instant case, *see supra* n. 1, the Second Circuit has also issued such a decision. *See New York v. Hendrickson Bros.*, 840 F. 2d 1065 (2nd Cir.), *petitions for cert. filed*, 57 U.S.L.W. 3061 & 3062 (U.S. July 2 & 8, 1988) (Nos. 88-21 & 43). (The fifth recent appellate court ruling on the fraudulent concealment doctrine in an (cont'd)

BACKGROUND

On November 5, 1985, the State of Texas filed a federal antitrust suit against Allan Construction Co. and its president, alleging their participation in a conspiracy to rig bids on state highway construction projects. App. 4. Apparently, there was no evidence that any acts done pursuant to the conspiracy occurred within the four year federal antitrust statute of limitations.[3] *See* Clayton Act Section 4B, 15 U.S.C. sec. 15b, as amended (1982). Consequently, the parties agreed that unless the doctrine of fraudulent concealment equitably tolled the running of the limitations period until at least November 5, 1981, Texas' suit was time barred. App. 5.

The district court flatly rejected Texas' contention in the foregoing regard. In pertinent part, the trial court ruled that Texas could not establish any affirmative concealment to toll the statute. In the court's view, the only evidence of concealment consisted of acts undertaken at the time of and in furtherance of the offense; such acts did not legally constitute "affirmative acts of concealment." Accordingly, the court granted summary judgment for defendants. *See* App. 2, 4-5, 13.

The acts proffered by Texas in *Allan* included the filing of false non-collusion affidavits, protection of the secrecy of bidrigging discussions and submission of complementary bids. App. 6, 13. Such acts are among those involved in the instant case. *See Colorado ex rel. Woodard*

(cont'd) antitrust context was rendered by the Sixth Circuit in a monopoly-type case. *See Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838 F. 2d 1445 (6th Cir.), *petition for cert. filed* (on other grounds) *sub nom. Pinney Dock & Transp. Co. v. Norfolk & W. Ry.*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 88-72).)

[3] The last project included in the alleged conspiracy was let on February 13, 1980, more than five and one-half years before suit was filed. *See* App. 5.

v. Western Paving Construction Co., 630 F. Supp. 206, 209-10 (D. Colo. 1986), *rev'd*, 833 F. 2d 867, 876 (10th Cir. 1987), *panel opinion vacated and district court decision aff'd by an equally divided court (per curiam)*, 841 F.2d 1025 (10th Cir. 1988) *(en banc)*.

On appeal, the Fifth Circuit reversed the district court. Initially, the appellate court rejected Texas' assertion that the bidrigging violation was "inherently self-concealing." App. 6-13, 20. However, the circuit court went on to hold that the affirmative acts necessary for fraudulent concealment need not be separate from the acts underlying the wrong itself. App. 13-16, 20. Accordingly, the appellate court concluded that Texas was entitled to present its evidence of concealment at trial. App. 20. Such affirmative acts of concealment analysis is contrary to that of the district court and appellate panel in this case on the same kinds of facts. *See* 630 F. Supp. at 210, *rev'd on other grounds*, 833 F. 2d at 877.

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ARGUMENT

As recognized by the appellate court in Allan, the first or "concealment" element of the equitable tolling doctrine potentially involves two concepts—inherent self-concealment and affirmative acts of concealment. App. 6. The *Allan* opinion is the most recent of several recent federal appellate decisions discussing these twin elements.[4] As the Fifth Circuit there stated, "these aspects of the fraudulent concealment doctrine have occasioned confusion in federal courts . . . ." App. 6. Unfortunately, *Allan* itself heightens, rather than alleviates, that confusion.

1. The Fifth Circuit's Decision in Allan Highlights the Need for the Supreme Court to Clarify the Fraudulent

[4] *See supra* n. 2

Concealment Doctrine in the Context of Per Se Antitrust Violations Such as Bidrigging. Citing *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), the Fifth Circuit in *Allan* acknowledged that several federal courts have held affirmative acts to be unnecessary for equitable tolling of the statute of limitations where the underlying wrong is inherently self-concealing. App. 7. However, the circuit court restricted application of such self-concealment theory to situations where the gist of the cause of action is fraud. The basis for the court's limitation in this regard was its view that concealment is inherent in fraud but, apparently, not in other offenses. *See* App. 7-8.

Having posited the foregoing dichotomy, the Fifth Circuit concluded that antitrust bidrigging violations are not inherently self-concealing. *See* App. 11. Essentially, it reasoned that bidrigging is not significantly different from other forms of price fixing.[5] Accordingly, if bidrigging were seen as being self-concealing, all other forms of price fixing would have to be viewed in the same fashion. However, Congress could not have intended for the fraudulent concealment doctrine to toll the statute of limitations in *every* price-fixing case.[6] App. 12.

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[5] In the Fifth Circuit's view, all forms of price fixing, including bidrigging, need to remain concealed in order to be successful. Similarly, the appellate court reasoned that all price-fixing conspiracies, not just bidrigging ones, are designed to extend over time in order to maximize monopoly-type profits. Finally, the court concluded that all prices charged by price fixers or bidriggers purport to be competitive to the extent that they hold themselves out as lawful. *See* App. 12.

[6] The Fifth Circuit assumed too much in implying that, if bidrigging and price fixing were inherently self-concealing, the fraudulent concealment doctrine would always be satisfied in such cases and the statute of limitations tolled. Even if every such *per se* offense were sufficient to meet the concealment prong, under the Fifth Circuit's own test the statute would still not be tolled unless the plaintiff, despite being duly dili- (cont'd)

In arriving at such conclusion, the *Allan* court's analysis muddies the jurisprudential waters by overlooking the fact that fraud is the very essence of the *per se* antitrust violations of bidrigging and price fixing. *See, e.g., United States v. Washita Construction Co.*, 789 F. 2d 809, 818 (10th Cir. 1986); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *United States v. Azzarelli Construction Co.*, 612 F. 2d 292, 298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980). The Fifth Circuit further confuses the issue by ignoring its own acknowledgement that concealment is inherent in the commission of bidrigging and price fixing. *See* App. 12 (such activity must remain concealed to be successful because public knowledge usually ends the agreement); *Greenhaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983) (such activity is normally concealed because of the applicable criminal and civil penalties).

Moreover, *Allan* asserts the existence of at least two different doctrines for tolling federal statutes of limitation —one applicable in fraud actions and another in antitrust cases. This contravenes the teaching of the Supreme Court itself that the doctrine of fraudulent concealment announced in *Bailey v. Glover* is applicable to and serves to toll *every* federal statute of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

Furthermore, the *Allan* opinion imposes on the antitrust laws a position of inferiority to laws applicable to fraud. Such juxtaposition is unwarranted in view of the

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(cont'd) gent had nonetheless failed to discover the facts forming the basis of its claim. *See* App. 5-6, 11-12 n. 20. *See also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Bailey v. Glover*, 88 U.S. (21 Wall.) at 349-50.

signal public importance of the competitive economic policies embodied in the antitrust laws. *See generally City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 & n. 16 (1978).

The preceding inherent self-concealment analysis and effects are exactly the same as those in the case at hand.

2. The Fifth Circuit's Decision in Allan Exacerbates the Split Among the Lower Federal Courts Regarding Application of the Fraudulent Concealment Doctrine. As noted above, the *Allan* court limited the inherent self-concealment approach solely to wrongs grounded in fraud and, for other types of cases, required affirmative acts of concealment in order to toll the statute of limitations. Although comporting with the operative interpretation in the instant case, *see* 630 F. Supp. at 210, such action flatly conflicts with decisions of at least two other circuit courts. *See New York v. Hendrickson Brothers*, 840 F. 2d 1065, 1084 (2nd Cir. 1988), *petitions for cert. filed*, 57 U.S.L.W. 3061 & 3062 (U.S. July 2 & 8, 1988) (Nos. 88-21 & 43); *Hobson v. Wilson*, 737 F. 2d 1, 33 & n.2 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).[7]

Indeed, the Fifth Circuit in *Allan* explicitly rejected the Second Circuit's *Hendrickson* holding that bidrigging is inherently self-concealing. App. 11. It also declined to follow the D.C. Circuit's *Hobson* application of the self-

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[7] *See also Colorado ex rel. Woodard v. Western Paving Constr. Co.*, 833 F. 2d 867, 879-80, 881 (10th Cir. 1987) (applying inherent self-concealment approach to *per se* antitrust offense of bid-rigging), *vacated and withdrawn (per curiam)*, 841 F. 2d 1025 (10th Cir. 1988) *(en banc), aff'g by an equally divided court* 630 F. Supp. 206 (D. Colo. 1986); *King & King Enter. v. Champlin Petroleum Co.*, 657 F. 2d at 1154-56 (applying inherent self-concealment theory to *per se* antitrust offense of price fixing). *See generally Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 988 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978).

concealment theory to wrongs which are not grounded in fraud but which merely contain an element of deception. App. 11-12 & n.20. This conflict among the circuits is made even more pointed by the fact that the contrary opinions in *Allan* and *Hendrickson* came in the very same context—antitrust highway bidrigging cases brought by states.

The conflict is further highlighted by the Sixth Circuit's action, akin to that of the Fifth Circuit, rejecting application of the inherent self-concealment concept outside the fraud context and requiring affirmative acts of concealment in such cases. *See Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F. 2d 1445, 1472 (6th Cir.), *petition for cert. filed* (on other grounds) *sub nom. Pinney Dock & Transport Co. v. Norfolk & Western Railway*, 57 U.S.L.W. 3075 (U.S. July 11, 1988) (No. 87-72.).[8] Although an antitrust case, *Pinney Dock* arose in a monopoly-type context which, unlike such *per se* offenses as bidrigging and price fixing, is not inherently fraudulent in nature.

3. The Fifth Circuit's Decision in Allan Underscores the Egregiousness of the Result in the Instant Case. Notwithstanding its rejection of the inherent self-concealment theory and the resulting contribution to the growing confusion and split among the federal courts, the *Allan* opinion indicates the erroneous nature of the result in the instant case.

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[8] Moreover, both *Allan* and *Pinney Dock* contribute to additional confusion among those courts following the "affirmative acts" formulation for the concealment prong of the equitable tolling doctrine. Those cases hold that the concealing conduct need not be separate and apart from, but may be part of, the underlying violation. *See Allan*, App. 13-14, 20; *Pinney Dock*, 838 F. 2d at 1473-77. However, another line of federal court cases holds exactly the contrary, requiring the concealing conduct to be independent of the commission of the substantive offense. *See, e.g., Western Paving*, 833 F. 2d at 877, *rev'g on other grounds* 630 F. Supp. at 210; *Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F. Supp. 885, 888 (M.D. Pa. 1985).

In *Allan*, Texas contended that acts done in furtherance of the bidrigging—such as filing false non-collusion affidavits, protecting the secrecy of bidrigging discussions and submitting complementary bids—could also constitute affirmative acts of concealment. The district court disagreed. App. 13. The lower court's view is in accordance with that expressed by the Tenth Circuit panel and the district court in the case at hand. *See* App. 13; F. Supp. at 209-10.

However, that approach was rejected by the Fifth Circuit in *Allan*. It ruled that affirmative acts of concealment need not be separate from the underlying wrong itself. In reaching this conclusion the appellate court relied in part on its prior decision in *Greenhaw v. Lubbock County Beverage Association*, 721 F. 2d at 1030, upholding tolling where the concealing acts were simultaneously intertwined with the substantive *per se* antitrust violation of price fixing. App. 13-14 & n.26.

The Fifth Circuit asserted a two-pronged rationale in support of its approach. First, fraudulent concealment is an equitable doctrine designed to prevent a wrongdoer which conceals its violation from being able to benefit therefrom by raising the statute of limitations as a defense. Given such purpose, it makes no difference when the concealment occurs. App. 15.

Second, it is difficult, if not impossible, to determine whether or not various asserted acts of concealment are independent of the underlying violation. Every concealing act contributes to the success of the offense by protecting it from discovery.[9] Moreover, it would be anoma-

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[9] Indeed, in the context of *per se* antitrust violations such as bidrigging and price fixing, which are subject to criminal (cont'd)

lous to hold that conduct having the same concealing effect in fact has different consequences in law depending on the timing of its occurrence. App. 15-16.

In light of such rationale, the appellate court in *Allan* rejected the district court's holding that false non-collusion affidavits constituted "mere denial" of wrongdoing and so could not legally comprise concealing conduct. It noted that denial may constitute concealment either where the parties have a fiduciary relationship or circumstances make it reasonable for the plaintiff to rely on the defendant's denial. While reliance may not have been reasonable once the highly publicized federal grand jury investigation began, App. 3, 16, it seemingly was reasonable prior thereto.

Applying the preceding approach to the instant case would have led to an outcome contrary to that reached here and in line with the effects of the decisions in *Allan* and *Hendrickson*. In other words, summary judgment would not have been entered against the State of Colorado dismissing its case. The result would have been a far more well-reasoned, principled and workable conclusion than that which was ultimately reached here.[10]

(cont'd) penalties and civil sanctions, prevention of discovery is itself one of the *goals* of the conspiracy. *See, e.g., Hendrickson Bros.*, 840 F. 2d at 1084 (citing *Western Paving*, 833 F. 2d at 881). *See also Allan*, App. 12; *Greenhaw*, 721 F. 2d at 1030. Consequently, it would seem that acts undertaken toward the goal of concealment could never be independent of the violation itself.

[10] This is not to suggest that there would be no difference in case outcome depending on whether the "inherent self-concealment" or "affirmative concealing acts as part of the violation" approach were utilized. In the former situation, the result would be partial summary judgment for the plaintiff on the concealment prong of the equitable tolling doctrine. In other words, if the jury found a bidrigging violation at all, then by (cont'd)

CONCLUSION

The Fifth Circuit's *Allan* decision magnifies exponentially the need for the Supreme Court to grant *certiorari* on the equitable tolling of the federal antitrust statute of limitations pursuant to the doctrine of fraudulent concealment. It is imperative that this Court do so in order to resolve the growing confusion and conflicts besetting the lower federal courts in this increasingly important area.

Of those cases presenting the issue, it is crucial that the Court grant *certiorari* in the instant case, as opposed to *Hendrickson* or, conceivably (assuming *certiorari* is sought), *Allan*. It is in the case at hand that the lower courts have gone furthest astray by requiring proof of affirmative concealing acts independent of the underlying wrong in order to toll the statute. It is here that the most egregious result, dismissal of the state's case, is involved. Consequently, the Court should grant the petition of the State of Colorado for a writ of *certiorari* in this case in order both to clarify the law among the lower federal courts and in order to rectify the erroneous result here.

Respectfully submitted,

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(cont'd) definition the offense had to have been concealed for it to have occurred. *See, e.g., Hendrickson Bros.*, 840 F. 2d at 1084 (citing *Western Paving*, 833 F. 2d at 881). Conversely, in the latter situation, the concealment issue would ordinarily be a fact question for the jury to decide. *See Allan*, App. 21.

APPENDIX

The STATE OF TEXAS,
Plaintiff-Appellant,

v.

ALLAN CONSTRUCTION COMPANY,
INC., et al., Defendants-Appellees.

No. 87-1766.

United States Court of Appeals,
Fifth Circuit.

Aug. 17, 1988.

State brought action against highway contractors for violation of federal antitrust laws by participating in conspiracy to rig construction bids. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted summary judgment for contractors on basis of statute of limitations, and State appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) acts taken to conceal wrongful conduct could support claim of fraudulent concealment sufficient to toll limitations period, even if they occurred at time of offense and furthered commission of offense; (2) bid rigging was not inherently self-concealing, and fraudulent concealment of bid rigging scheme was thus required to be proven by evidence of affirmative acts of concealment; and (3) State presented sufficient evidence to raise fact issue on fraudulent concealment.

Reversed and remanded.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, KING, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In this antitrust action, the State of Texas alleges that the defendants participated in a scheme to rig the bidding on state highway construction projects. The district court granted summary judgment for defendants, finding that the action was barred by the statute of limitations. The court rejected the State's contention that the statute was tolled by fraudulent concealment, finding that the State's only evidence of concealment, certain acts undertaken at the time of the conspiracy and in its furtherance, could not be considered acts of concealment. Unpersuaded that the doctrine of fraudulent concealment is so limited, we reverse.

I

In October 1980, a federal grand jury in Austin, Texas, began to investigate allegations that construction companies had conspired for several years to fix the bid price for highway construction contracts. According to federal prosecutors, the companies involved in the scheme made secret agreements to inflate their bids and to restrict the number of bidders on each project. As part of the conspiracy, the companies falsely swore in affidavits submitted with each bid that they had taken no action "in restraint of free competitive bidding." The grand jury issued its first indictments in November 1981, naming

twelve contracting firms and ten individuals as conspirators.

Although the criminal prosecution proceeded under federal antitrust and mail fraud statutes, State officials participated in the investigation from its inception. The grand jury heard testimony from officials in the State Highway Department, including Ted Ziller, an engineer responsible for supervising the bidding process. Ziller, along with engineer Bobbie Templeton, also assisted federal prosecutors in gathering information before the grand jury convened, meeting with government attorneys as early as August 1980. At the request of the United States, the Highway Department also provided records pertaining to the State's dealings with particular companies. However, the State Highway Department made no record of which companies were under investigation.

The grand jury proceedings were widely publicized in Texas. In particular, an article printed in the October 7, 1980, edition of the *San Antonio Express News* specifically noted that Allan Construction Company, along with approximately twenty other firms, had been subpoenaed to produce documents related to bidding activities. This article, like many others concerning the investigation, was circulated throughout the Highway Department.

The Texas Attorney General's office also was aware of the investigation even before the grand jury first met. In the summer of 1980, Assistant State Attorney General Katherine Bond spoke with federal prosecutors about the inquiry. Sometime in 1980 or early 1981, the Attorney General's office retained an economist to use bid statistics to identify which firms were involved in bid-rigging. This

effort was unsuccessful, as were the State's requests that federal investigators disclose the identity of suspected contractors.

The grand jury never indicted Allan Construction Company or any of its employees. On April 6, 1982, however, the grand jury returned an indictment against Price Construction Company. Shortly thereafter, an attorney for one of Price's employees provided the State Attorney General's office with a list of those contractors the employee might identify as part of the conspiracy. Allan Construction Company was on that list.

The State had further evidence of Allan's possible involvement in May 1982, when Travis Jenkins, an employee of C. H. Allison Company, signed a sworn statement for the Attorney General's office. In the statement Jenkins said that an Allan employee had agreed on at least one occasion to refrain from bidding on a project as part of the ongoing scheme.

On November 5, 1985, the State filed suit in federal district court against Allan Construction Company and William Allan, Jr., its president during the alleged conspiracy. The complaint alleged that the defendants had violated federal antitrust laws by participating in a conspiracy to rig construction bids. The district court granted summary judgment for defendants on the basis of the statute of limitations. In doing so, the court rejected the State's contention that the statute of limitations had been tolled by the defendants' fraudulent concealment of illegal activity. According to the district court, the State failed to show "affirmative acts of concealment" other than those acts—such as the submission of false affidavits—

done "in furtherance of the conspiracy." The court also concluded that the State failed to show that it had diligently pursued its claims against Allan. In particular, the court found that in light of the Highway Department's involvement in the federal investigation and the *Express News* article naming Allan as a potential suspect, no reasonable jury could conclude that the State did not have adequate inquiry notice of its claim as early as 1980.

II

The parties agree that in the absence of fraudulent concealment, the State's suit is time-barred. An antitrust action must be brought within four years from the date on which it accrues.[1] In a conspiracy action, that period begins with an overt act done pursuant to the conspiracy.[2] The last contract bid in which the State alleges wrongdoing was let on February 18, 1980, but the suit was not filed until November 5, 1985. In order to avoid the statute, then, the State must demonstrate that fraudulent concealment tolled the running of the limitations period until November 5, 1981, at the earliest.

As the district court correctly recognized, a plaintiff may invoke the fraudulent concealment doctrine only by proving two elements: first, "that the defendants concealed the conduct complained of, and second, that [the plaintiff] failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his

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1. *See* Clayton Act § 4B, 15 U.S.C. § 15b.

2. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971)

claim."[3] The district court concluded that the State established neither element in this case. We deal with each element in turn.

A. Acts of Concealment

To prove the first element—that Allan "concealed the conduct complained of"—the State offered evidence that Allan conducted covert meetings, submitted affidavits that falsely denied any collusion, and submitted intentionally high complementary bids to make other inflated bids appear legitimate. If these acts do not suffice to toll the statute, the State argues, then the bid-rigging conspiracy was "inherently self-concealing," thus eliminating the requirement of specific acts of concealment. Because these aspects of the fraudulent concealment doctrine have occasioned confusion in federal courts, we review the cases in some detail.

1. *Self-Concealing Conspiracy.* As most courts have stated the test, the statute of limitations is tolled only if the defendant has engaged in "affirmative acts" of concealment.[4] As we have stated, "Concealment by defendant only by silence is not enough. [The defendant] must be

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3. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir.1979), *cert. denied*, 449 U.S. 905, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980).

4. *See Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir.1986) (plaintiff must show that defendant "engaged in affirmative conduct that fraudulently concealed the existence of a cause of action"), *cert. denied*, — U.S. —, 107 S.Ct. 279, 93 L.Ed.2d 254 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53 (1st Cir.1984) (same), *cert. denied*, 470 U.S. 1056, 105 S.Ct. 1765, 84 L.Ed.2d 826 (1985).

guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry."[5]

However, several courts also have stated that if the underlying wrong is "self-concealing," the plaintiff need not show affirmative acts. For example, in a fraud case, *Bailey v. Glover*,[6] the Supreme Court wrote that

> when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing . . . .[7]

This is consistent with the general rule that in a fraud case, the plaintiff need only aver the underlying fraud in order to toll the statute of limitations until such time as the plaintiff had some notice of the wrong; fraud is, by its very nature, self-concealing.[8] We recognized the distinction in *Prather v. Neva Paperbacks, Inc.*,[9] a case in which

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5. *Crummer Co. v. Du Pont*, 255 F.2d 425, 432 (5th Cir.) (quoting *Arkansas Natural Gas Co. v. Sartor*, 78 F.2d 924, 929 (5th Cir. 1935)), *cert. denied*, 358 U.S. 884, 79 S.Ct. 119, 3 L.Ed.2d 113 (1958); *see also Wood v. Carpenter*, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807 (1879) (same).

6. 88 U.S. (21 Wall.) 342, 22 L.Ed. 636 (1875).

7. *Id.* at 349-50 (emphasis added).

8. *See, e.g., Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir.1968) ("The original fraud is regarded as a continuing affirmative act, and mere silence of the defendant is treated as concealment."), *cert. denied*, 394 U.S. 987, 89 S.Ct. 1468, 22 L.Ed.2d 763 (1969); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743 (1946) (noting that where plaintiff has been diligent in pursuing fraud claim, statute is tolled even though there have been no acts of concealment).

9. 446 F.2d 338 (5th Cir.1971).

the plaintiff sought to apply the fraudulent concealment doctrine to a copyright infringement action. We stated that "[the fraudulent concealment] doctrine, which is applicable to any cause of action, should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud."[10]

Other circuits have held that the "self-concealment" notion may extend to wrongs that are not based in fraud, but which contain an element of deception. In *Hobson v. Wilson*,[11] the plaintiffs alleged that FBI agents had infringed on their first amendment rights by disseminating false information about the plaintiffs' political affiliations. The D.C. Circuit held that a wrong is "self-concealing" for the purpose of fraudulent concealment if "the deception, misrepresentation, trick or contrivance is a necessary step in carrying out the illegal act" rather than "separate from the illegal act and intended only to cover up the act."[12] Because secrecy and deception were essential to the disinformation scheme alleged in *Hobson*, the court found that summary judgment for defendants on the statute of limitations issue was inappropriate.

A few examples illustrate the D.C. Circuit's "self-concealment" analysis. To steal an antique vase is not a self-concealing wrong; the true owner knows the vase is stolen even if the owner does not know the identity of the thief. On the other hand, to sell a fake vase as if it were

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10. *Id.* at 341 n. 2 (citing *Holmberg*).

11. 737 F.2d 1 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985).

12. *Id.* at 33 n. 102.

an antique is not only fraud, it is a self-concealing wrong. Deception is an essential element of the wrong, and one that is not intended merely to cover up the wrong itself. By contrast, to steal a vase and to replace it with a worthless replica is not self-concealing. The wrong is theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen.

Having the benefit of *Hobson's* analysis, two other circuit courts have considered whether a bid-rigging conspiracy may be "self-concealing" where the plaintiffs' claim is based on the antitrust laws. In an opinion later vacated by the en banc court, *Colorado v. Western Paving Construction Co.*,[13] a panel of the Tenth Circuit dealt with allegations of bid-rigging conspiracy quite similar to those in this case. The panel first rejected the argument that submission of false affidavits or other denials of wrongdoing could constitute "affirmative acts" of concealment.[14] The court also excluded from consideration deceptive acts committed in furtherance of the conspiracy itself, such as the submission of complementary bids to make the inflated "low" bid appear competitive. In the panel's words, "Acts that are part of the original wrong, while

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13. 833 F.2d 867 (10th Cir.1987), *panel opinion vacated and district court decision aff'd by an equally divided court*, 841 F.2d 1025 (1988) (en banc).

14. *See Western Paving*, 833 F.2d at 876 (quoting *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155 (10th Cir.1981) (mere denial of wrongdoing cannot be an act of concealment), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982)).

they may conceal the wrong, are not acts of concealment; they are acts of perpetration."[15]

Nevertheless, the *Western Paving* panel held that the bid-rigging conspiracy could be "self-concealing," thus eliminating the need for plaintiff to demonstrate affirmative acts of concealment:

> If a bidrigging conspiracy exists, it must remain concealed to be successful. Any knowledge of the conspiracy would lead plaintiff to seek action immediately and result in collapse of the conspiracy. Furthermore, unlike many conspiracies, a bidrigging conspiracy is likely to exist for an extended period of time. To be attractive to all bidders, the conspiracy must cover more than one job—or must provide some quid pro quo to the "losing" bidders. The very nature of a bidrigging conspiracy makes it likely that future bids will also be rigged. . . . These additional bidrigging activities not only provide the compensation for one of the "losing" bidders in the original bid but also help to conceal the bidrigging activity on the other bids. Such subsequent fraudulent acts may in themselves amount to affirmative acts of concealment. In any event they show that a bidrigging conspiracy, if it exists at all, is *per se* self-concealing.[16]

The Second Circuit adopted this reasoning in another bid-rigging case, *New York v. Hendrickson Brothers, Inc.*[17] Relying on *Hobson,* the court also noted that the submission of a rigged bid was similar to the sale of a fake antique vase: the bid purports to be something it is not, a price

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15. *Western Paving,* 833 F.2d at 877.

16. *Id.* at 881 (citation omitted).

17. 840 F.2d 1065, 1084 (2d Cir.1988).

that is the result of competition rather than collusion.[18] For these reasons, the court concluded that "proof of the conspiracy itself sufficed to prove concealment by the co-conspirators."[19]

Although we accept the D.C. Circuit's definition of a "self-concealing" wrong—that is, one in which deception is an essential element for some purpose other than merely to cover up the act—we do not agree with the Second Circuit that antitrust violations arising from a bid-rigging conspiracy are always self-concealing.[20] It is

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18. *Id.* at 1083.

19. *Id.* at 1084.

20. We are careful to note, however, that the consequences of classifying a wrong as "self-concealing" will be different in this circuit than in the D.C. Circuit. In *Hobson,* the D.C. Circuit held that when a wrong is self-concealing, the burden shifts to the defendant to demonstrate plaintiff's lack of diligence. *See Hobson,* 737 F.2d at 35. It is settled in our circuit, on the other hand, that even where the plaintiff has shown affirmative acts of concealment, the plaintiff bears the burden of showing his diligence. *See Beef Industry,* 600 F.2d at 1169 ("[A]n antitrust plaintiff must shown that . . . he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim."), 1171 ("The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue."). Hence, to classify a wrong as self-concealing relieves the plaintiff only of the burden of demonstrating affirmative acts; it does not lessen the plaintiff's burden of proving reasonable diligence.

Curiously, it is also not clear that the D.C. Circuit would agree that plaintiff need not prove affirmative acts where the wrong is "self-concealing." Although in *Hobson* the D.C. Circuit classified the wrong as "self-concealing," the court did not seem to conclude that affirmative acts of concealment were irrelevant. Indeed, in deciding that the wrong was self-concealing, the court mentioned the "affirmative efforts" of concealment that justified tolling the statute, such as destruction of incriminating documents and false authorship of pub-

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true of any price-fixing conspiracy that "it must remain concealed to be successful."[21] Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is, in the words of *Hobson*, intended solely to "cover up" the illegal act. Nor is bid-rigging unique because it must "exist for an extended period of time.[22] Every cartel seeks to reap monopoly profits for as long as possible, and because a cartel must limit output, its members have to distribute fewer sales among themselves. We cannot see how this aspect of a bid-rigging conspiracy makes it more deceptive than any other price-fixing conspiracy.

We also are unpersuaded by the Second Circuit's additional argument that bid-rigging is self-concealing because a rigged bid purports to be competitive when in fact it is collusive. Any price charged for a product or service, whether in the form of a bid or otherwise, purports to be competitive at least insofar as it purports to be lawful. In short, we cannot conclude that Congress, in writing the Clayton Act's four-year statute of limitations, could have intended for the fraudulent concealment doctrine to apply to every price-fixing case. Hence, we reject the State's contention that because the bid-rigging conspiracy was in-

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lications. *See Hobson*, 737 F.2d at 36-37. The D.C. Circuit thus may consider the "self-concealment" label important only insofar as it affects the plaintiff's burden of proof on the issue of diligence; in other words, it may be that in the D.C. Circuit's view, even self-concealing conspiracies must contain affirmative acts of concealment. As our discussion in text indicates, we do not share this view.

21. *Western Paving*, 833 F.2d at 881.

22. *Id.*

herently self-concealing, it need not prove affirmative acts of concealment.

2. *Affirmative Acts.* The State argues that even if the conspiracy was not "self-concealing," there were sufficient affirmative acts of concealment to toll the statute. According to the State, these included the submission of false affidavits, efforts to protect the secrecy of bidding negotiations, and submission of intentionally high bids to legitimate lower but collusive bids. The district court rejected the argument, finding that "these acts are the acts which were allegedly done in furtherance of the conspiracy, but do not constitute affirmative acts of concealment." This point of view is in accord with the Tenth Circuit panel's conclusion in *Western Paving*, that "acts of perpetration" cannot be counted as "acts of concealment."[23]

In this circuit, however, we never have held that the acts that demonstrate fraudulent concealment must be wholly separate from the acts underlying the wrong itself. Indeed, in *Greenhaw v. Lubbock County Beverage Ass'n*,[24] we upheld a jury finding of fraudulent concealment where the acts of concealment were intertwined with the acts of price fixing. We wrote:

> The retailers argue that no evidence indicated concealment. We are unpersuaded. There was evidence

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23. *Western Paving*, 833 F.2d at 877; *see also Pennsylvania v. Lake Asphalt & Petroleum Co.*, 610 F.Supp. 885, 888 (M.D.Penn. 1985) ("[F]raudulent concealment consists of affirmative acts independent of the underlying conspiracy.").

24. 721 F.2d 1019 (5th Cir.1983). A later panel disapproved of *Greenhaw* as to an aspect other than its fraudulent-concealment analysis in *International Woodworkers v. Champion International*, 790 F.2d 1174, 1181 (5th Cir.1986).

> of secret agreements and covert price-setting sessions. The concealment comports with common sense. Such activities are normally concealed, especially in light of the criminal and civil penalties that may result if they are discovered.[25]

Hence, while we did not conclude that the conspiracy in *Greenhaw* was "self-concealing," we held that evidence of efforts aimed at keeping the price-fixing activities secret, even if undertaken at the time of the conspiracy, could count as proof of fraudulent concealment.[26]

Refusing to allow affirmative acts that further a conspiracy to support a finding of fraudulent concealment rests upon a view of the equitable doctrine of tolling that we find unacceptable. This view may be stated simply: Congress outlawed a conspiracy in restraint of trade and set a period of four years within which suits for injury from such a conspiracy must be brought. A conspiracy includes an agreement to achieve the illegal end and includes acts that further that agreement. Hence, acts that are part of the conspiracy cannot serve to "extend" the four year period because Congress requires that suits claiming injury for such a conspiracy be brought within that time; to consider acts in furtherance as acts of concealment alters the period of limitation intended by Congress.

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25. *Id.* at 1030.

26. *Accord* 2 Areeda & Turner, *Antitrust Law* ¶ 325d, at 124 ("[T]he limitation period is tolled by secret conspiracies, such as most clear-cut price-fixing agreements, which are not only created and maintained outside of the public eye, but in which elaborate efforts are taken by the participants to disguise the activity.").

Although the argument has some force, we find it unpersuasive for two reasons. First, this "tidy" view of distinct spheres for offense, limitations and equitable tolling misperceives the doctrine of equitable tolling. Through the statute of limitations Congress has chosen to confer on an accused wrongdoer the benefit of repose once the limitations period has passed. However, the equitable doctrine of fraudulent concealment recognizes that this benefit should not be available to a wrongdoer who takes undue advantage of the statute by attempting to conceal his conduct.[27] The fact that that such concealment occurs at the time of the wrong itself rather than afterwards does not make the wrongdoer any more deserving of the statute's protection.

Second, as "tidy" as the proposed approach may seem, we cannot imagine a principled way to determine what acts of concealment are "independent" from the underlying wrong. We are not persuaded that the distinction turns on whether the act of concealment "furthered" the wrong; every act of concealment furthers the success of the offense by stalling its detection. Likewise, to consider only those acts of concealment completed subsequent in time to the wrong would lead to indefensible results. For example, if Allan employees had shredded incriminating books and records the day before the last bid was let, this act would surely be pertinent to the fraudulent-concealment inquiry, but under the district court's approach we would be bound

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27. *See Bailey*, 88 U.S. at 349 (stating that to permit the defendant to conceal his wrong "until such time as the party committing the fraud to plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure").

to ignore it. It is true that because almost every price-fixing conspiracy involves some efforts aimed at secrecy, our rejection of a requirement that "acts of concealment" be independent of the conspiracy may make it easier to prove fraudulent concealment in antitrust cases. Nevertheless, no other approach is better principled or more workable.

We also disagree with the district court's holding that on the summary judgment evidence before the court, Allan's submission of affidavits of denial could not, as a matter of law, constitute acts of concealment. It is true that, generally speaking, denial of wrongdoing is no more an act of concealment than is silence.[28] Nevertheless, many courts have recognized, and so now do we, that a denial may constitute concealment where the parties are in a fiduciary relationship, or where the circumstances indicate that it was reasonable for the plaintiff to rely on defendant's denial.[29] While it is unlikely that the State's reliance on the affidavits could have been reasonable once the federal investigation began, the district court should at least consider the argument on remand.

B. Diligence

Even where a defendant has concealed wrongful conduct, the statute of limitations is tolled only until such time as the plaintiff, exercising reasonble diligence, could

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28. *See Crummer,* 255 F.2d at 432.

29. *See Berkson,* 743 F.2d at 56; *Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir.1978); *King & King,* 657 F.2d at 1155.

have discovered the facts forming the basis for the claim.[30] Moreover, the plaintiff need not have actual knowledge of such facts; "[t]hose who have learned of facts 'calculated to excite inquiry' must inquire."[31] The district court here concluded that because the State knew in 1980 that Allan's records had been subpoenaed by federal prosecutors, the State is chargeable with knowledge that it had an antitrust claim against the company.

However, as we explained in *Beef Industry*, even though a plaintiff might have inquiry notice of a potential claim, it does not necessarily follow that reasonable diligence will discover sufficient facts to support legal action. In *Beef Industry*, for example, the district court held on summary judgment that plaintiffs were not entitled to tolling by fraudulent concealment because they had not been diligent in pursuing their claim. The court found that the plaintiffs had sufficient notice because a nearly identical antitrust claim against the same defendants had been filed several years earlier in California.[32]

Although we agreed with the district court that the plaintiffs could be charged with knowledge of the allegations in the California case, we did not agree that failure to file suit on the basis of such information necessarily established a lack of due diligence for the purpose of summary judgment.

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30. *See Beef Industry*, 600 F.2d at 1170; *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975).

31. *Beef Industry*, 600 F.2d at 1171; *see also Prather*, 446 F.2d at 341.

32. *See Beef Industry*, 600 F.2d at 1169-70.

> Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc.*, 5 Cir.1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[33]

We emphasized that while the plaintiffs ultimately would bear the burden of persuasion on the question of diligence, in the summary judgment context it was up to defendants "as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit."[34] To justify summary judgment, we concluded, defendants would have had to prove that the plaintiffs had access to information that would independently verify the allegations in the California complaint.[35]

The approach we adopted in *Beef Industry* has not been altered by the Supreme Court's recent refinement

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33. *Id.* at 1171 (emphasis retained; footnote omitted).

34. *Id.*

35. *See id.; see also Hobson*, 737 F.2d at 36 ("[S]imply because a person knows he has been injured by one person does not mean he should be held to know of every other participant.").

of the summary judgment standard, at least insofar as it applies in this case. In *Celotex Corp. v. Catrett*,[36] the Court held that summary judgment is appropriate against a party who has failed to demonstrate the existence of a genuine issue of material fact on an element of the case for which that party bears the burden of proof, even where the party moving for summary judgment has not offered evidence negating the opponent's claim.[37] Here, the State has introduced some evidence of its diligence; the State's attorneys have sworn that they made repeated attempts to obtain information from federal prosecutors in addition to attempting to identify bid-riggers by statistical means. Unless Allan's evidence had been so compelling that no reasonable jury could consider these attempts reasonably diligent, summary judgment was not appropriate even under the standard of *Celotex*.

Allan's evidence was not so strong. It is true that the Highway Department's failure to keep records of the companies about which federal prosecutors inquired indicates less than aggressive diligence about the State's claims. And, on the basis of news accounts, the State is deemed to have been aware in 1980 that Allan's records were subpoenaed by the grand jury.[38] Nevertheless, these facts do not conclusively establish that greater diligence on the State's part would have led to evidence that the

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36. 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

37. *Id.* 106 S.Ct. at 2553-54; *see also James v. Nico Energy Corp.*, 838 F.2d 1365, 1372 (5th Cir.1988).

38. *Cf. Beef Industry*, 600 F.2d at 1170 (plaintiff chargeable with knowledge of matters in the public record); *United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980) (plaintiffs chargeable with knowledge of local news articles).

claim was "well grounded in fact."[39] Indeed, the summary judgment evidence indicated that the State had the first specific evidence supporting its claim in April 1982, when indicted individuals first named Allan as a conspirator. It will be for the jury to determine whether reasonable diligence could have revealed evidence specifically establishing Allan's culpability prior to November 5, 1981.

III

In sum, we hold today that acts taken to conceal wrongful conduct may support a claim of fraudulent concealment even though they occur at the time of the offense and further commission of the offense. We also hold that bid-rigging is not inherently self-concealing; fraudulent concealment of a bid-rigging scheme must be proven by evidence of affirmative acts of concealment. Under this standard, the State has presented sufficient evidence to raise a fact issue on fraudulent concealment. The judgment of the district court is REVERSED.[40] In the event of trial

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39. *See* Fed.R.Civ.P. 11.

40. The state also contends on appeal that the district court erred in dismissing the state's plea for injunctive relief. On this point, the district court did not elaborate its reasons for decision, writing only that, "Plaintiff has failed to allege any continuing conspiracy or illegal conduct." Defendants had not urged the district court to dismiss the injunction request on this basis, so the state never had an opportunity to be heard on the point. Although the district court may well be correct that the state's pleadings are inadequate in this regard, we must vacate the dismissal because plaintiff had no opportunity to convince the court otherwise. *See Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1364-65 (2d Cir. 1985),*aff'd*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); *Powell v. United States*, 849 F.2d 1576, — - — (5th Cir.1988);

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on remand, the issue of fraudulent concealment will be for the jury.[41]

APPENDIX

Sample Jury Instructions in Civil Antitrust Cases Task Force of the Section of Antitrust Law of the American Bar Association, 1987

Pp. G-2-G-5

"Certain Defenses and Exemptions"
Instruction 1

Fraudulent Concealment

Defendant has raised as a defense the statute of limitations. Statutes of limitations require that a person who believes himself to have been injured by the wrongful act of another must bring suit to recover damages caused by

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Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

We also must vacate the district court's dismissal of the state's pendent claims under Texas law; the basis for dismissal was that once the federal claims dropped out, the court lacked subject matter jurisdiction to adjudicate the pendent claims.

41. Our holding can be translated to trial reality by use of the sample jury instructions prepared by the Antitrust Division of the American Bar Association, which we attach as an appendix to this opinion. To these instructions we would add, however, that denial of wrongdoing may constitute an affirmative act of concealment where the denial is made under circumstances indicating that it was reasonable for plaintiff to rely on the denial in failing to discover the wrongful conduct that caused plaintiff's injury. *See* our discussion *supra*, slip opinion at p. 4921, at pp. — - —.

that injury within a certain period of time after that injury occurred.

In this case, plaintiff cannot recover for any injury which occurred prior to [*date X, four years before filing of the complaint*],[1] unless plaintiff brings itself within an exception that is called the doctrine of fraudulent concealment. Plaintiff is asking to recover for injury which it claims began as early as [*specify date*], a date earlier than [*date X*]. In order to establish that the fraudulent concealment doctrine applies and thus recover damages for any injuries that occurred prior to [*date X*], plaintiff must prove each of the following elements by a preponderance of the evidence:

> First, that it did not know of [*describe alleged violation*] until on or after [*date X*] and that it could not have learned of the violation through the exercise of due diligence until after that date;[2] and

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1. The date to be inserted is four years prior to the filing of the complaint, as provided in Section 4B of the Clayton Act, 15 U.S.C. § 15b (1984).

2. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir.1979), *cert. denied*, 449 U.S. 905 [101 S.Ct. 280, 66 L.Ed.2d 137] (1980) (*"Beef Industry"); Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975) (*"Dayco"); Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir.1974).

This instruction will require some tailoring to address the specific allegations made in each case.

It has been held that public proceedings—such as congressional or administrative hearings, private lawsuits or a criminal indictment—may cause the statute to begin to run. *Beef Industry*, 600 F.2d at 1170-71; *Dayco*, 523 F.2d at 394; *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 295-96 (8th Cir.1975), *cert. denied*, 424 U.S. 915 [96 S.Ct. 1116,

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Second, that defendant actively concealed the alleged activities that caused plaintiff's injuries. It is not enough that defendant failed to disclose the alleged activities; plaintiff must also prove that defendant took affirmative steps to prevent plaintiff from learning of those activities.[3]

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47 L.Ed.2d 320] (1976); *In re Shopping [Carts] Antitrust Litigation*, 1982-1 Trade Cas. (CCH) ¶ 64,612 at 73,348 (S.D.N.Y. 1982). It is not necessary that the plaintiff have knowledge, actual or constructive, of all the details of this cause of action. *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated Ltd.*, 185 F.2d 196, 209 (9th Cir.1950), *cert. denied*, 341 U.S. 912 [71 S.Ct. 620, 95 L.Ed. 1349] (1951). Some courts have held that in conspiracy cases plaintiff's knowledge that he has been injured by apparently unilateral acts of one defendant is not enough to start the statute running. *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155-56 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 [102 S.Ct. 1038, 71 L.Ed.2d 320] (1982) (*"King v. [sic] King"*); *In re Plywood Antitrust Litigation*, 76 F.R.D. 570, 586 (E.D.La. 1976).

3. *See, e.g., Rutledge*, 576 F.2d at 250; *City of Kansas City v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 [83 S.Ct. 256, 9 L.Ed.2d 171] (1962) *and* 373 U.S. 914 [83 S.Ct. 1297, 10 L.Ed.2d 415] (1963). Mere nondisclosure may be enough if there is a fiduciary duty or other affirmative obligation to make disclosure. *Glazier Steel Corp. v. Toyomenka, Inc.*, 392 F.Supp. 500, 503 (S.D.N.Y.1974). Some courts have said that a conspiracy may be self-concealing so that little or nothing more than underlying conspiratorial acts are necessary. *See King & King*, 657 F.2d at 1156; *Baker v. F & F Investment*, 420 F.2d 1191, 1199 (7th Cir.), *cert. denied*, 400 U.S. 821 [91 S.Ct. 40, 41, 27 L.Ed.2d 49] (1970) (*"Baker"*); *Ingram Corp. v. J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 at 78,414 (E.D.La.1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir.1983) (*"J. Ray McDermott"*).

Conduct that has been held sufficient to constitute acts of concealment includes holding secret meetings at hotels and private residences, destruction of notes of meetings, making of phone calls from pay phones, submission of bids falsely appearing to be regular, and false execution of noncollusion affi-

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If you find that plaintiff has proven each of these elements, then you may find that the doctrine of fraudulent concealment applies to plaintiff's claim. In that event, the length of time for which plaintiff may recover damages may be expanded to include the earliest injury which you find was suffered by plaintiff.* If you find that plaintiff has failed to prove either of the elements, then you must find that the statute of limitations bars any claim by plaintiff relating to any injury that occurred prior to [*date X*].

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davits. *See, e.g., J. Ray McDermott,* 1980-1 Trade Cas. (CCH) at 78,413-15; *Ohio Valley Electric Corp. v. General Electric Co.,* 244 F.Supp. 914, 922 (S.D.N.Y.1965) *("Ohio Valley Electric"); Illinois v. Sperry Rand Corp.,* 237 F.Supp. 520, 523-24 (N.D. Ill.1965). Most courts that have considered the question have held that denial of wrongdoing is not enough, but there are some indications to the contrary. *See* cases cited in American Bar Association, Section of Antitrust Law, *Antitrust Law Developments* 428 nn. 358, 359 (2d ed. 1984).

Again, the instruction in a particular case should be tailored to deal with the evidence presented.

* Note by the Court: This sentence may assume that once plaintiff shows that defendant fraudulently concealed any part of plaintiff's antitrust injury, plaintiff may recover for all injuries caused by the conspiracy, including those resulting from acts committed more than four years before the time at which reasonable diligence would have discovered evidence to support a claim. A strong argument can be made, however, that there can be no recovery for an injury suffered more than four years before the filing of the complaint or, if fraudulent concealment be proved, four years before the date by which the plaintiff, with reasonable diligence, should have discovered the injury. We express no opinion on the issue, as it is not before us. A district court might use Rule 49, Fed.R.Civ.P. to hedge this legal uncertainty by submitting separate interrogatories for each possible damage period. It follows that the parties should similarly construct their damage models.